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IN THE

Supreme Court of the United States

October Term, 1963

No. 1071

SHENANDOAH VALLEY BROADCASTING, INC., ET AL.,

Petitioners,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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ASCAP's argument, like the decision of the courts below, shows the need for clarification by this Court of the principles to be applied in construing third-party beneficiary provisions of antitrust consent decrees, of which many have been entered by district courts in recent years.

In its argument opposing certiorari ASCAP proceeds (as did the courts below) on the false assumption that the antitrust decree against it must be interpreted in a way that

allows it the maximum of freedom to exercise its independent business judgment in fixing the terms and conditions on which to make its repertory available to music users. There might be some force in ASCAP's contentions as to the desirability of having music licenses "negotiated by business men instead of being written for them by courts" (ASCAP's Brief, p. 8 fn.) if petitioners were dealing with independent music publishers and composers. In fact, however, petitioners are dealing not with the composers and publishers severally but with ASCAP, a combination of music publishers and composers that dominates the business of licensing copyrighted music. Acting as a combination, the ASCAP members cannot expect to enjoy the same unlimited freedom and discretion that they would enjoy individually. If the Amended Final Judgment can be interpreted so as to deprive ASCAP of its power to impose license terms of its own choosing on music users, it should be so interpreted.

ASCAP's contention that, despite the broad compulsory licensing directions expressed in Sections VI and IX(A) of the Amended Final Judgment, Section VII(B), which by its terms deals only with the method of computing the fee under ASCAP's broadcaster licenses, constitutes the sole limitation placed by the Judgment on ASCAP's power to fix the terms of broadcasters' licenses, proceeds from the false assumption described above. While Section VII(B) provides that, in the case of "per program" licenses, ASCAP may charge a fee based upon the payment of a specified sum, or a portion of the broadcasters' revenues,

from each program using ASCAP music, the opening lines of Section VII(B) make it clear that by their terms these provisions refer only to the fee and not to any other aspect of the license. For the reasons stated above and in the petition for certiorari, this limited provision should not be broadened into an authorization to ASCAP to refuse to issue a license to a broadcaster seeking a license covering some but less than all of his programs. The only conclusion that can fairly be drawn from Section VII(B) is that if the broadcaster seeks a "per program" license ASCAP can compel him to pay a fee with respect to all programs using ASCAP's music that are covered by the license. That Section VII(B) has, in fact, no broader implications is confirmed by the terms of ASCAP's existing "LOCAL STATION PER PROGRAM TELEVISION LICENSE"—so designated by ASCAP (R. 118a)—which expressly excludes network and cooperative programs from the coverage of the license and does not require the licensee to make any fee payments to ASCAP with respect to such excluded programs (R. 122a, 129a-130a).

There is no merit in ASCAP's further contention that petitioners' application was properly dismissed because a proceeding under Section IX of the Judgment is an inappropriate vehicle for resolving the "complex and time-consuming antitrust charges" interposed in ASCAP's answer to petitioners' license application (ASCAP's Brief, p. 14). ASCAP cannot, simply by injecting antitrust charges (which are unsupported by any record evidence) by way of its answer filed in the licensing proceeding, deprive petitioners of their right to a hearing in a fee-fixing

proceeding under Section IX. What, if any, relevance ASCAP's various antitrust claims may have in a Section IX proceeding was not determined by either court below, since petitioners' application was dismissed as a matter of law, and need not be decided here.

Respectfully submitted,

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